Office - Supreme Court, U.S.
FILED
OCT 15 1984
ALEXANDER L. STEVAS
CLERK

No. 84-414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MEAD JOHNSON & CO.,

Petitioner,

VS.

LOUISVILLE AND NASHVILLE RAILROAD CO.,

Respondent.

and

MEAD JOHNSON & CO.,

Petitioner,

VS.

SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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October 12, 1984

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QUESTION PRESENTED FOR REVIEW

With the reservation that Respondent does not believe the decision of the Seventh Circuit Court of Appeals conflicts with the Eighth Circuit's decisions, Respondent adopts Petitioner's statement of the question presented for review.

PARTIES

All parties to this action are shown in the caption. In compliance with Supreme Court Rule 28.1, Seaboard Systems Railroad, Inc., represents it is the successor corporation to the Louisville & Nashville Railroad Company and is a subsidiary of CSX Corporation. Southern Railway Company is a wholly owned subsidiary of Norfolk Southern Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

With the exception of where Petitioner's statement of the case conflicts with the Trial Court's findings of fact and conclusions of law, Respondent would adopt Petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' DETERMINATION THAT THE "MISROUTING EXCEPTION" TO THE STATUTORY DOCTRINE PROHIBITING DISCRIMINATION IN RAILROAD FREIGHT TARIFFS DOES NOT APPLY TO THE CASE AT BAR WAS CORRECT, AND IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT.

The Supreme Court, in considering whether exceptions to the non-discriminatory rate statutes set forth in 49 U.S.C. §10100, *et seq.* exist, has spoken in *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915), where, at page 97, the Court states:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. . . . 'Neither the intentional or accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed' . . . It was 'the purpose of the Act to have but one rate, open to all alike, and from which there could be no departure.' " [citation omitted].

The Court of Appeals, in its opinion below, correctly states the applicable rules of law:

". . . The [Supreme] Court has held that shippers are conclusively presumed to know the filed tariffs applicable to their shipments. *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577, 581 (1919); *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97-98 (1915); *Kansas City Southern Railway Co. v. Carl*, 227 U.S. 639, 653 (1913). See also *Aero Trucking, Inc. v. Regal Tube Co., supra*, 594 F.2d at 621-22. The Court has also said that no equitable defenses can prevent enforcement of the lawful rates, and that no act or omission by the carrier, except for the running of the statute of limitations, can prevent enforcement of the lawful tariffs. *Louisville & Nashville Railroad Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924). See *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 485 (1939) (equitable considerations not a defense); *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577, 582-83 (1919). These decisions remain good law. Congress has not amended the Interstate Commerce Act to change the rigid enforcement of tariffs, and the Supreme Court has consistently adhered to these precedents and to the Act's original dominant purpose of precluding under any guise preferential treatment in interstate freight rates. See *Southern Pacific Transportation Co. v. Commercial Metals Corp.*, 456 U.S. 336, 343-44 (1982)."

The controlling rule of law being clearly stated, a review by this Court would involve only questions of evidence applied under familiar legal rules.

The factual findings of the Trial Court are supported by substantial evidence, and, indeed, the Seventh Circuit declined to overturn the Trial Court's findings of fact (page A-7 of Petitioner's Appendix). This Court's prior decisions control this question and should not be reviewed.

II.

WHETHER OR NOT THE COURT OF APPEALS' DECISION WAS BASED UPON A CORRECT READING OF THE LAW, PETITIONER'S ARGUMENT IS WITHOUT MERIT.

The case relied upon by Petitioner and cited as the basis for the asserted conflict in decisions is *Johnson Machine Works, Inc. v. Chicago, Burlington & Quincy Railroad Company*, 297 F.2d 793 (8th Cir. 1962). *Johnson Machine Works* states, at page 796:

> "The Interstate Commerce Commission has, in a long line of decisions, consistently, squarely held that *where the rate and the route are inserted by shipper in the bill of lading* and they do not coincide, it is the duty of the initial carrier's agent to call the shipper's attention to the inconsistency and inquire whether he desires the rate or the routing . . ." [Emphasis added].

The Trial Court, in making its evidentiary determination, found that the allegedly inconsistent rate and route information were not contained in the bills of lading. In order to find in Petitioner's favor, this Court first must make an evidentiary determination inconsistent with the Trial Court or make a determination that "shipping papers" as that term is used later by the Court in *Johnson Machine Works* includes the "rate charts" prepared by Petitioner's agents. Then, having expanded the bill of lading exception to a rate chart-shipping papers exception, find that the facts presented by the case at bar fit within this expanded exception.

If this Court finds that the Court of Appeals below was correct in holding that the misrouting exception is not available, then Petitioner's case is without merit. If this Court should find that the Court of Appeals below was

incorrect, and that the *Johnson Machine Works* misrouting exception does exist, then Petitioner's case does not fit within the *Johnson Machine Works* exception, and is still without merit.

The suggestion that the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 has changed the law in this area, or should affect the outcome of this case, is also without merit. The Staggers Rail Act contains no indication by Congress that it is dissatisfied with the Supreme Court decision stated in *Maxwell*, and followed continuously since. Further, the Staggers Rail Act was not in effect at the time of the rail shipments. As the Court of Appeals found:

> ". . . Congress has not yet amended the Act to permit greater flexibility in situations like the one before us, and we are unwilling to engage in deregulation by adjudication." [page A-12, Petitioner's Appendix].

Also without merit is Petitioner's suggestion that 49 U.S.C. §10761 allows the Interstate Commerce Commission to grant relief from the non-discrimination rules to shippers. That statute clearly states that such relief is restricted to contract carriers, thus preserving the rule against discrimination in rates paid by shippers.

III.

THERE ARE NO SPECIAL OR IMPORTANT REASONS REQUIRING SUPREME COURT REVIEW OF THIS CASE.

Petitioner has asserted no compelling reason for the Court to accept this case. The alleged "split in the circuits" is illusory, and a long line of controlling decisions by this Court make such a determination unnecessary in any event. The facts of this case are peculiar, and as shown by the lack of any citations to other cases where

the shipper used "rate charts", this factual situation is not likely to recur. Petitioner has failed to demonstrate that the Court of Appeals decided an important question of law in a way which is in conflict with the decisions of the other circuits or the Supreme Court. Finally, it has furnished no basis for the invocation of this Court's supervisory powers.

CONCLUSION

Because there is no conflict established and because there are no special or important reasons for reviewing this case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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